

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 ROGER A. WEINKAUF,  
11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE,  
14 Commissioner of Social Security,  
15 Defendant.

)  
) Case No.: C04-2166 CRD  
)  
)

) ORDER RE: SOCIAL SECURITY  
) DISABILITY APPEAL  
)  
)  
)

16  
17 Plaintiff Roger Weinkauff appeals the final decision of the Commissioner of the Social  
18 Security Administration (“Commissioner”) who denied his application for Disability Insurance  
19 Benefits (“DIB”) under Title II of the Social Security Act (“SSA” or the “Act”), and granted  
20 Supplemental Security Income (“SSI”) disability benefits under Title XVI, beginning January 8,  
21 1996. For the reasons set forth below, the Court AFFIRMS the Commissioner’s decision.

22 I. FACTS AND PROCEDURAL HISTORY

23 Plaintiff is a sixty-year-old male. In 2006, Plaintiff was granted SSI benefits dating back  
24 to 1996, but was denied DIB benefits because the ALJ found his condition did not predate his  
25 last insured date. Plaintiff now asserts that the ALJ erred by not finding him disabled prior to his  
26 last insured date in 1984, and in the alternative, argues that the ALJ erred by not considering a  
27 closed 1993 application and finding him disabled as of that date.

28 On July 1, 1993, Plaintiff filed his first application due to asthma and psychological  
conditions, alleging an onset date in 1982. The application was denied initially in August 1993

1 and upon reconsideration in July 1994. On January 5, 1995, Plaintiff requested a hearing which  
2 was denied as untimely and the claim was dismissed.

3 On January 8, 1996, Plaintiff filed a second application again alleging disability since  
4 1982. The claim was denied initially and upon reconsideration. Thereafter, the case was  
5 remanded but subsequently denied. Plaintiff timely requested an administrative law judge  
6 (“ALJ”) hearing, which was held in September 2001. On December 26, 2001, ALJ Joyner  
7 issued an unfavorable decision. On June 26, 2002, the Appeals Council remanded the case for a  
8 supplemental hearing. On January 14, 2003, a supplemental hearing was held before ALJ  
9 Nichols, who issued a decision on August 26, 2003 finding Plaintiff ineligible for DIB but  
10 eligible for SSI back to an onset date of June 10, 2002. The Appeals Council denied review and  
11 in September 2004 Plaintiff filed an action in this court. The parties stipulated to remand to  
12 another ALJ due to missing documents in the record.

13 On February 27, 2006, a *de novo* hearing was held before ALJ Robinson. The ALJ heard  
14 testimony from Plaintiff, who was represented by counsel, Steven Robey, Esq., Administrative  
15 Record (“AR”) at 771-820. The ALJ rendered a decision on February 13, 2006, finding Plaintiff  
16 ineligible for DIB but eligible for SSI as of January 8, 1996. Plaintiff requested review by the  
17 Appeals Council and review was denied, rendering the ALJ’s decision the final decision of the  
18 Commissioner. 20 C.F.R. §§ 404.981, 422.210 (2006). On January 24, 2008, Plaintiff initiated  
19 this civil action for judicial review of the Commissioner’s final decision.

## 20 II. JURISDICTION

21 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. sections  
22 405(g) and 1383(c)(3).

## 23 III. STANDARD OF REVIEW

24 Pursuant to 42 U.S.C. section 405(g), this Court may set aside the Commissioner’s denial  
25 of social security benefits when the ALJ’s findings are based on legal error or not supported by  
26 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir.  
27 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such  
28 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

1 *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
2 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical  
3 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d  
4 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
5 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas*  
6 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than  
7 one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

#### 8 IV. THE DISABILITY EVALUATION

9 As the claimant, Mr. Weinkauff bears the burden of proving that he is disabled within the  
10 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)  
11 (internal citations omitted). The Act defines disability as the “inability to engage in any  
12 substantial gainful activity” due to a physical or mental impairment which has lasted, or is  
13 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
14 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are  
15 of such severity that he is unable to do his previous work, and cannot, considering his age,  
16 education, and work experience, engage in any other substantial gainful activity existing in the  
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180  
18 F.3d 1094, 1098-99 (9th Cir. 1999).

19 The Commissioner has established a five-step sequential evaluation process for  
20 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
21 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
22 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any  
23 step in the sequence, the inquiry ends without the need to consider subsequent steps.

24 Step one asks whether the claimant is presently engaged in “substantial gainful activity.”  
25 20 C.F.R. §§ 404.1520(b), 416.920(b).<sup>1</sup> In the present case, the ALJ found that Plaintiff had not  
26 engaged in substantial gainful activity since the alleged onset of the disability. AR 672, Finding

---

27  
28 <sup>1</sup>Substantial gainful activity is work activity that is both substantial, *i.e.*, involves significant  
physical and/or mental activities, and gainful, *i.e.*, performed for profit. 20 C.F.R. § 404.1572.

1 2. At step two, the claimant must establish that he has one or more medically severe  
2 impairments, or combination of impairments, that limit his physical or mental ability to do basic  
3 work activities. If the claimant does not have such impairments, he is not disabled. 20 C.F.R. §§  
4 404.1520(c), 416.920(c). In this case, the ALJ found Plaintiff has the severe impairments of  
5 asthmatic bronchitis, panic disorder, and post-traumatic stress disorder, beginning on January 8,  
6 1996. AR 676, Finding 4. The ALJ also found that prior to June 30, 1984, Plaintiff's last  
7 insured date for Disability Insurance Benefits, he did not have a severe impairment or  
8 combination of impairments and was therefore not eligible for DIB at any time. AR 672,  
9 Finding 3. If the claimant does have a severe impairment, the Commissioner moves to step three  
10 to determine whether the impairment meets or equals any of the listed impairments described in  
11 the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or  
12 equals one of the listings for the required twelve-month duration requirement is disabled. *Id.*  
13 The ALJ found that Plaintiff's impairments met the requirements of listing 12.06 of Appendix 1.  
14 AR 678, Finding 5. The ALJ therefore concluded Plaintiff was disabled for purposes of SSI only  
15 as of January 8, 1996. *Id.*

## 16 V. ISSUES ON APPEAL

17 Plaintiff presents the following principal issues on appeal:

- 18 1. Did the ALJ err in not granting Plaintiff's earlier application?
- 19 2. Did the ALJ err in not finding Plaintiff disabled prior to his last insured date?

20 Dkt. No. 39.

## 21 VI. DISCUSSION

22 A. *The ALJ did not err in not granting Plaintiff's earlier application.*

23 Plaintiff argues that the ALJ erred because he should have found him disabled as of his  
24 1993 application date. Plaintiff points to specific medical evidence in support of a finding of  
25 disability for that period. However, the Court agrees with the ALJ's finding that, "[a]n  
26 individual's earliest date of eligibility for supplemental security income is the date of his  
27 application for those benefits. Accordingly, January 8, 1996 is the earliest date that the claimant  
28 could receive SSI." AR 677. The 1993 application was denied, dismissed, and Plaintiff did not

1 appeal. Thus, despite the medical expert's opinion that Plaintiff could have been disabled as of  
2 1993, and even if he met the disability criteria as of 1993, he was ineligible for SSI until his  
3 second application date in 1996.

4 Although the 1993 application had been denied and dismissed, Plaintiff argues the ALJ  
5 should have considered it for the following reasons: 1) he was denied due process because he did  
6 not receive written notice of the July 1994 denial; 2) the Commissioner erred in dismissing his  
7 January 5, 1995 request for a hearing; 3) he has implicitly and explicitly requested reopening of  
8 the 1993 application; and 4) the ALJ made a *de facto* reopening of the 1993 application. Dkt. 39  
9 at 16.

10 First, Plaintiff argues his right to due process has been denied because he did not receive  
11 timely notice of the July 1994 denial. On January 5, 1995, Plaintiff requested a hearing before  
12 an ALJ to appeal the denial. On March 3, 1995, ALJ Ranney denied Plaintiff's request for a  
13 hearing because the request was over three months late. AR 97. ALJ Ranney noted, "Claimant  
14 has a high school education. Alcohol or drug addiction is not an issue. Accordingly, there is no  
15 good cause to extend the time for filing. Therefore, the claimant's request for hearing is hereby  
16 dismissed. The reconsideration determination dated July 28, 1994 remains in effect." AR 98.  
17 That decision also informed Plaintiff he had 60 days from the date he received the notice to  
18 appeal the ALJ's decision. AR 94. The Court notes that although Plaintiff had the opportunity  
19 to do so, he did not appeal the decision. Plaintiff apparently instead filed a new application in  
20 January 1996. Accordingly, the Court finds Plaintiff was not denied due process; he had the  
21 opportunity to appeal and did not do so.<sup>2</sup> The Court finds the ALJ did not err in not reopening  
22 the 1993 application.

23 Plaintiff also asserts he implicitly and explicitly requested the opening of the 1993  
24 application. Plaintiff argues that he implicitly requested the reopening with his request for a

---

25 <sup>2</sup> Plaintiff points out that the 1993 application and other various documents are missing from the  
26 administrative record, which is Defendant's duty to maintain. However, the Court finds none of  
27 the documents are required for a ruling in this case, and therefore finds Plaintiff has not been  
28 prejudiced due to their exclusion. Moreover, even if Plaintiff did not receive the first denial  
notice, he does not claim he did not receive the 1995 hearing denial, which clearly set forth his  
appeal rights.

1 hearing in January 1995, and that his subsequent January 1996 application was also an implicit  
2 request to reopen the 1993 application. Plaintiff argues he explicitly requested a reopening at the  
3 2003 ALJ hearing. The Court disagrees that the request for a hearing or subsequent application  
4 were implicit requests to reopen. Regardless, Plaintiff did not exercise his right to appeal the  
5 1995 denial and therefore failed to exhaust relief available for the 1993 application.

6 Next, Plaintiff argues that because ALJ Robinson mentioned the 1993 application at the  
7 hearing and considered whether he was disabled prior to 1984, he must have been considering  
8 the 1993 application, and that in so doing made a “*de facto* reopening” of the 1993 application.  
9 Plaintiff argues that, “the Commissioner has explicitly stated at all times that the issue in  
10 Plaintiff’s case is whether he is disabled prior to his date last insured in 1984.” Dkt. 39 at 18.  
11 Plaintiff inexplicably insists in both his opening brief and reply that the ALJ was or should have  
12 been considering both types of disability prior to 1984. The Court disagrees. Plaintiff confuses  
13 DIB and SSI: the sole reason the ALJ considered whether he was disabled prior to 1984 was to  
14 determine whether he was eligible for *Disability Insurance Benefits*, not SSI benefits. SSI  
15 benefits may begin on the application date whereas DIB may begin only if disability is found to  
16 have existed prior to the last insured date. As Plaintiff is well aware, his last insured date is in  
17 1984—precisely why the ALJ considered whether Plaintiff was disabled prior to 1984—for the  
18 purposes of DIB only.

19 The Court does not find good cause for reopening the 1993 application. Social Security  
20 administrative deadlines exist because memories fade and medical records may become lost,  
21 lessening the integrity of the claim. Here, Plaintiff had the opportunity to appeal the denial, but  
22 did not, and has given no good cause for failing to appeal. Thus, the Court finds the ALJ did not  
23 err in not considering the 1993 application open, and did not err by not considering whether  
24 Plaintiff was disabled prior to his 1996 application for purposes of SSI.

25 ///

26 ///

27 ///

28 ///

1           B.       *The ALJ did not err in finding Plaintiff not disabled prior to his last insured date.*

2           Plaintiff asserts that the ALJ erred because he did not find him disabled prior to his last  
3 insured date in 1984. After a detailed analysis of the medical records prior to 1984, the ALJ  
4 concluded that:

5           These few chart notes only indicate rather minor problems that were treated and  
6 were unaccompanied by any findings that they cause any obstacles in the  
7 claimant's performance of basic work activities. Thus, the "problems" popped  
8 up, were treated, and then apparently went away for periods of time, as indicated  
9 by the extended times in which the claimant did not seek or receive any treatment.  
10 From these few medical notations, there is no reasonable inference that the  
11 claimant had any severe anxiety problem on or before his date last insured. In  
12 fact, there is no reasonable inference that the claimant had any severe impairment  
13 on or before that date.

14 AR 674.

15           Plaintiff does not dispute that there are few medical records prior to 1984, however, he  
16 argues the ALJ should have placed more weight on his testimony and that of his wife, Mrs.  
17 Weinkauff, regarding his pre-1984 complaints. Absent evidence of malingering, the ALJ can  
18 only reject Plaintiff's testimony regarding the severity of his symptoms by giving "specific, clear  
19 and convincing reasons" for the rejection. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036; *see also*  
20 *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *Thomas*, 278 F.3d at 958-59. In finding  
21 a claimant's testimony unreliable, an ALJ must render a credibility determination with  
22 sufficiently specific findings, supported by substantial evidence. "General findings are  
23 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence  
24 undermines the claimant's complaints." *Lester*, 81 F.3d 821, 834 (9th Cir. 1995). "In weighing  
25 a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies  
26 either in his testimony or between his testimony and his conduct, his daily activities, his work  
27 record, and testimony from physicians and third parties concerning the nature, severity, and  
28 effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792  
(9th Cir. 1997). The ALJ found Plaintiff and Mrs. Weinkauff's testimonies regarding the pre-  
1984 period to be not fully convincing because the level of severity alleged is not supported by

1 the medical record for that time, and because their testimonies related back over twenty years  
2 ago. With respect to Plaintiff's testimony the ALJ concluded:

3       The objective medical findings do not indicate the existence of severe  
4       impairments on or before the date last insured or the severity of the alleged  
5       impairments as indicated by the claimant on or before the date last insured. His  
6       testimony is a recollection of events and incidents that occurred over 20 years  
7       ago. The medical reports written at that time are more convincing than the  
8       claimant's attempt to dredge up some recollection of his condition at a far away  
9       time.

10 AR 676.

11 Similarly, regarding Mrs. Weinkauff's testimony the ALJ concluded that:

12       I believe this witness testified to the best of her knowledge concerning her  
13       observations and beliefs concerning the claimant's medical condition on or before  
14       his date last insured. But the same criticism of the claimant's testimony can be  
15       made of Ms. Weinkauff's testimony: it is a recollection after the passage of over  
16       20 years and without the support of any objective medical findings.

17 AR 676.

18       Plaintiff adds that because the ALJ did not have the benefit of the missing 1997 and 2001  
19       hearing transcripts, the ALJ could not compare their testimonies for consistency. The Court  
20       notes that while this is true, the ALJ did not find the witnesses' testimonies internally  
21       contradictory, he found them unsupported by the medical records which indicate Plaintiff did not  
22       seek regular or ongoing treatment for debilitating impairments prior to 1984. The Court finds the  
23       ALJ determined, based on substantial evidence in the record, that Plaintiff's symptoms were less  
24       severe than he alleges, for the reasons the ALJ set forth. There simply is not sufficient medical  
25       documentation to warrant a finding of disability prior to 1984. After reviewing the hearing  
26       transcript, the Court notes that Plaintiff and Mrs. Weinkauff's testimonies did not paint a clear  
27       picture of treatment and medication during the pre-1984 period. The ALJ noted that he would  
28       stop asking Plaintiff questions and instead allow him the opportunity to talk with his attorney in  
29       an attempt to make a clearer list of all medical providers and treatment he received during that  
30       time. AR at 796. The ALJ's assessment Plaintiff and Mrs. Weinkauff's testimonies is supported  
31       by clear and convincing reasons, based on substantial evidence, and is free of legal error. *See*  
32       *Green v. Heckler*, 803 F.2d 528, 532 (9th Cir. 1986) (stating that ALJ's credibility



1 determinations are entitled to great deference); *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.  
2 1982) (stating that ALJ's role is to judge credibility of claimant).

3 Lastly, Plaintiff argues that the ALJ did not consider the combination of his mental  
4 impairments with his asthma. The Court disagrees. The ALJ analyzed in detail his mental  
5 complaints as well as his asthma complaints for the period prior to his last insured date in 1984.  
6 *See* AR 673-76.

## 7 VII. CONCLUSION

8 For the reasons set forth above, the Commissioner's decision is **AFFIRMED** and the case  
9 **DISMISSED**.

10 DATED this 27<sup>th</sup> day of August, 2008.

11 

12 Carolyn R. Dimmick  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28